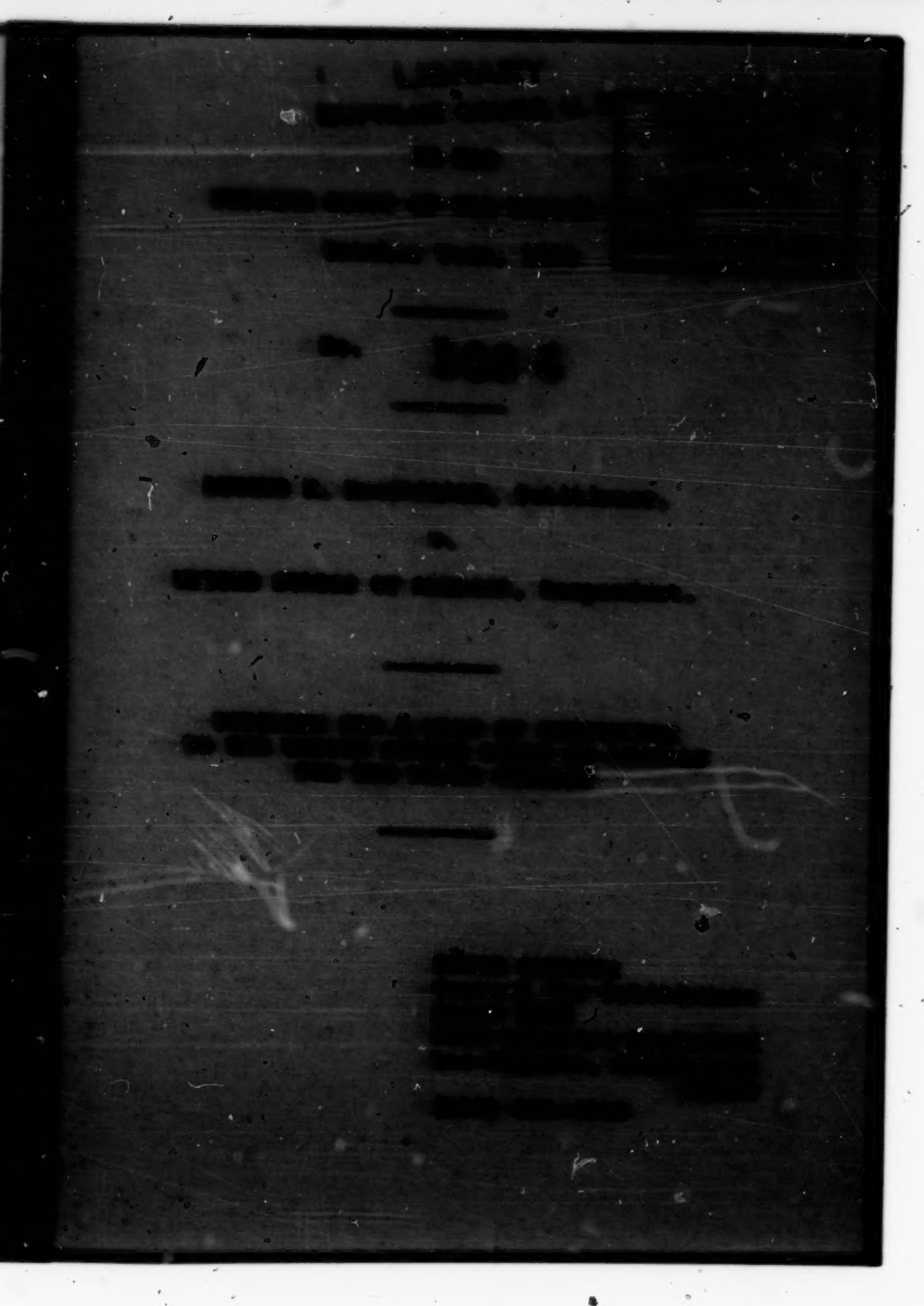

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

LUCIUS R. MacFARLANE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1970

No.

LUCIUS K. MacFARLANE, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on September 16, 1970.

CITATION TO OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit was entered September 16, 1970, and is printed in Appendix "A" hereto.

JURISDICTION

The judgment of the Court of Appeals

for the Ninth Circuit was made and entered on September 16, 1970, and is printed in Appendix "A" hereto. A copy of the order of the Court of Appeals for the Ninth Circuit denying Appellant's petition for rehearing, filed October 12, 1970, is printed in Appendix "B". A copy of the order of the Court of Appeals for the Ninth Circuit staying issuance of mandate provided that Petitioner's petition for certiorari is filed in the office of the Clerk of this Court on or before November 12, 1970, is printed in Appendix "C". A copy of this Court's order extending time to file petition for writ of certiorari is printed in Appendix "D". The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

(1) Whether the evidence was sufficient to convict.

(2) Whether the erroneous sustaining of objections to questions addressed to

witness Kevorkian was so prejudicial as to require reversal.

(3) Whether the admission into evidence of Government's Exhibit 32 D was so prejudicial as to require reversal.

(4) Whether incurable prejudice resulted to the Petitioner from the following:

(a) The Trial Judge referred to the National Scholarship Foundation, at numerous times throughout the trial, as "NSF".

(b) The Trial Judge interrupted direct examination of the Petitioner and openly exhibited contempt, skepticism and cynicism of the Petitioner's case, which was telegraphed to the jury.

(c) The Trial Judge failed to permit counsel for Petitioner to complete his closing argument.

(d) The Government's closing argument was highly improper; the slanderous remarks

made by Government's counsel resulted in incurable prejudice.

(c) The chart used by Government's counsel, over the objections of defense counsel, substantially misstated the material in the brochure in question and resulted in incurable prejudice to Petitioner. Thereafter, defense counsel was not permitted to complete his argument to counteract this prejudicial chart.

(5) Whether the erroneous admission into evidence of testimony of witness Creighton, to which objections were made, was so prejudicial as to require reversal.

(6) Whether the Court of Appeal is powerless to be concerned with the matter of denial of probation, where Petitioner has demonstrated to the Court of Appeals and where the Court of Appeals has conceded that the probation report used by the Trial Court was an "unfair" probation report.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The constitutional provisions involved are the self-incrimination and due process clauses of the Fifth Amendment to the United States Constitution.

STATEMENT

Petitioner is an individual who has been indicted in the United States District Court for the Central District of California upon charges of violation of 18 U.S.C. §1341 (mail fraud). The indictment was filed on January 22, 1969, charging Petitioner with thirty counts of mail fraud, in violation of 18 U.S.C. §1341.

On April 16, 1969, Petitioner was convicted, by jury verdict, of thirty counts of mail fraud, in violation of 18 U.S.C. §1341.

The Petitioner moved in the District Court for acquittal at the close of the Government's case. This motion was denied by Honorable Irving Hill. The District

Judge further denied Petitioner's motion for acquittal at the end of all of the evidence. The District Judge denied Petitioner's motion for a new trial. The District Judge denied Petitioner's motion for judgment of acquittal notwithstanding the verdict. The District Judge refused Petitioner's request for probation.

REASONS FOR GRANTING THE WRIT

This petition raises substantial and important questions concerning the administration of criminal justice in the federal courts.

I

THE EVIDENCE WAS NOT SUFFICIENT TO SUPPORT PETITIONER'S CONVICTION.

Viewing the evidence in the light most favorable to the Government, the most that it showed was that the Petitioner was a poor businessman and used poor judgment in the timing of his mailing. If for instance, the mailing had gone out after some fund raising had been

accomplished by Shafer, Kevorkian or Hull, or if Petitioner had been successful in soliciting any funds from any individuals or corporations the Government would have had no case. Or if the postal inspectors had not intercepted the mailing and scared off all persons involved, and the Petitioner had raised any money prior to the time he was arrested, the Government would have had no case. The Petitioner candidly told the postal inspectors that he had no money that he was just getting the corporation started and that after he observed the response from the high schools, he would raise the amount of money necessary to fund the scholarships. The Petitioner believed, and perhaps he was very naive, that he had entered into this foundation, believing that out of the monies he could and would receive from others that he would accumulate enough to pay the scholarships. No conviction can

be sustained, no matter how visionary might seem that scheme.

In U. S. vs. Rabinowitz, 327 Fed. 2d 62 (1964), citing Durland vs. United States, 161 U.S. 306 (a scheme for the sale of bonds), the Court said: "the significant facts is the intent and purpose. The question presented by this indictment to the jury was not, as counsel insisted, whether the business scheme suggested in this bond was practicable or not. If the testimony had shown that this provident company, and the defendant, as its president, had entered in good faith upon that business, believing that out of the moneys received they could by investment or otherwise make enough to justify the promised returns, no conviction could be sustained, no matter how visionary might seem the scheme."

"In every mail fraud case, there must be a scheme to defraud, representations

known by defendants to be false and some person or persons must have been defrauded. United States vs. Baren, 305 F. 2d at page 528, (a case involving the sale of knitting machines). The scheme to defraud must have included the intent to do so. Even if the statements complained of were false, defendants must have known them to be false and they must have intended to defraud in order to be found guilty."

II

EXCLUDING THE OFFERED TESTIMONY OF KEVORKIAN RESULTED IN INCURABLE PREJUDICE TO THE PETITIONER AND DENIAL OF DUE PROCESS

Thomas testified (R.T., p. 156-159) that in the presence of a Mr. Bob Dumas, Mike Kevorkian, and Wayne Hull (Sharkey) and a girl named Carol that he had told the Petitioner not to mail out the mailing in question; that it would be a fraud; and that under no circumstances was his name to be used. This testimony conveyed the impression to the jury, in no

uncertain terms, that it was the Petitioner who was champing at the bit to get his mailing out and that young Mr. Thomas was just an innocent bystander, who was being used by the Petitioner in his evil scheme. (It had already been clearly pointed out that Thomas devised the entire program) (R.T., p. 156-159) This was completely contradicted by Kevorkian in his testimony (R.T., p. 721, l.-18 - p. 723). Then defense counsel attempted to illicit testimony from Kevorkian, which was relevant to contradict Thomas' entire position; that it was Thomas and not the Petitioner who was anxious to get the mailing out. (R.T., p. 725, l. 7-16) The Court, we respectfully submit, was in error in stating that the purpose of the testimony was to show bias on the part of Thomas. This was merely testimony, which if believed, would contradict the Government's position, that the Petitioner was the person responsible for attempting

to get this mailing out. It would show, and it was very important to show to the jury, that the Petitioner was busy on many other projects, as testified to by his secretary, and that Thomas and Thomas alon was the moving force in getting this mailing out. Kevorkian would have testified, if permitted to do so, that immediately prior to the mailing Thomas told Kevorkian that he was sick and tired of the Petitioner dragging his feet on this mailing; that Thomas was anxious to get it out because he had to make some money; wanted to make money from it; and that MacFarlane had not been following through in getting this mailing out. The Government's entire case was based on the testimony of Thomas and the Petitioner should have been permitted to contradict that testimony by this independent third party witness. This statement was offered not for the purpose of proving the truth of what it purported to say, but for the purpose of showing

that it was said and the state of mind of Thomas. It also was a prior inconsistent statement to the position taken in Thomas' testimony.

Thomas testified that when he made the statement set forth at R.T., p. 160, that two people were present, a secretary named Carol and Wayne Hull (Sharkey). Hull denied that such a statement was ever made at his presence. This testimony should have been allowed to show not only that the statement was never made, but that it was someone other than the Petitioner who was attempting to get this mail out. By excluding it, the jury never had the benefit of this valuable and critical information, which surely would have benefited the Petitioner's position.

A statement offered for the purpose of showing that something was said, not that these statements were true or false is not hearsay. Bank of America vs. Taliaferro, 144 CA 2d 578. Out-of-court

statements are admissible when offered to prove good faith. Weber vs. Leuschner, 240 CA 2d 829. The foregoing citations are State of California citations, however, we realize that the Federal Courts sometime use state citations as being helpful in determining a question of law.

An extra judicial act or declaration may be admitted into evidence where it tends to explain or show the character, motive, purpose, or intent of the act or transaction in dispute. People vs. Frangacakis, 184 CA 2d at 549; California Evidence Code §1241.

The statement by Thomas would also qualify as a declaration against his interest which is not hearsay. California Evidence Code §1230.

Prior inconsistent statements of witnesses are not hearsay. California Evidence Code §1235-1238.

Statements of mental or physical are

not hearsay. California Evidence Code §1250-1252.

Incriminating statements made by a co-conspirator in furtherance of the conspiracy are admissible. Since this was contended by the Government to be mail fraud and Thomas was actively participating in the mailing, and certainly at the point of the offered evidence, he was a co-conspirator. The theory is that the reliability of the admission is insured by the fact that a person would not ordinarily falsely incriminate himself. McCormick Evidence (1954) §239; Carbo vs. The United States, 314 F 2d 718.

Up to that point, the Trial Court had admitted all of the extremely prejudicial statements attributable to the Petitioner by Thomas, all of which were made, according to Thomas, when nobody but Thomas and the Petitioner were present.

Therefore, excluding this offered testimony was extremely prejudicial to the

Petitioner and caused irreparable prejudice to the Petitioner's case.

The Government had throughout the trial conceded that Thomas was a co-conspirator up until the time that he left the alleged fraudulent conspiracy, when he was fired by the Petitioner. The Government in its brief to the Court of Appeals offered no authority to contradict Petitioner's position. The testimony was further admissible because a foundation had been laid for it. The Government, on direct examination, had asked Thomas questions concerning statements made and Thomas testified that he had made certain statements in the presence of Hull (Sharkey) and Kevorkian. Thomas was cross-examined concerning said statements. Therefore, since a foundation had been laid, Kevorkian should have been permitted to testify to show prior inconsistent statements made by Thomas.

The Trial Court erred in excluding this critical testimony. The Court of Appeals concedes that it was error to exclude it but shrugs off the importance of the excluded testimony by stating that "While there was some technical error in connection with two matters of evidence, (without specification) we have concluded, in overall consideration, that the error was not prejudicial as to require reversal."

In a fraud case, where it is vitally important for the jury to judge not what the Petitioner did, but what he was "thinking" at the time that he did it, a matter of evidence with regard to statements made by his co-conspirator, Thomas, for which a foundation had been laid, became critical in causing the jury to convict this particular Petitioner and therefore should not have been treated as "some technical error".

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III

ADMISSION INTO EVIDENCE OF GOVERNMENT'S EXHIBIT 32-D CAUSED IRREPARABLE PREJUDICE TO PETITIONER.

This Exhibit was unsigned and undated. It was found in a file to which others besides the Petitioner had access and in which others besides the Petitioner filed things. (R.T., p. 667, l. 14-18) The handwriting on it was identified by Thomas to be Thomas' handwriting. When Petitioner's secretary was asked to circle the handwriting on the page that she considered to be Petitioner's she circled the same handwriting that Thomas had identified as his own. Certainly Thomas was in a better position to identify his own handwriting than anyone else. The document expressed only the philosophy of Thomas and Kopelman and that specifically rejected by the Petitioner. It was extremely prejudicial to the Petitioner, since using a rule of logic, everyone knows that you get a very

small percentage of replies on a mass mailing; in this case, as a matter of fact, 225 $25 checks were sent in, all intercepted by the postal authorities, out of a mailing of in excess of 28,000, or less than 1%. It was an extremely untrustworthy document and caused irreparable and incurable prejudice to the Petitioner.

The case of Booth vs. United States, 139 Fed. 252, seems to be in point. It also involved a piece of paper found in the defendant's office containing a typewritten list of firms over which was written the quotation, "Firms who want their money" in pencil. There was no evidence to show that this notation was in the defendant's handwriting. It was held by the Federal Court that it was improper to admit it into evidence.

In this case, we have a piece of paper obviously prepared by Thomas, since Thomas identified his own handwriting on

it, and not by the Petitioner and is admitted into evidence against the Petitioner, not Thomas. We respectfully submit that this was manifestly unfair and caused irreparable prejudice to the Petitioner.

IV

INCURABLE PREJUDICE AND THE DENIAL OF A FAIR TRIAL RESULTED TO THE PETITIONER FROM THE FOLLOWING: THE TRIAL JUDGE'S REFERENCE TO THE NATIONAL SCHOLARSHIP FOUNDATION AS "NSF"

It is well known that the term "NSF", refers to the term "non-sufficient funds" in a bank account. This is common knowledge, and it appeared, we respectfully submit, to the jury to be a sarcastic and cynical reference to the National Scholarship Foundation as not having any funds. (R.T., p. 967, l. 2-10) The Judge first referred to the National Scholarship Foundation (R.T., p. 967, l. 4) then (R.T., p. 967, l. 9, 10) the Trial Judge states as follows: "And I will refer to

it now as NSF, and you understand when I use those initials that is what I mean." The term "NSF" is used again in (R.T., p. 967, l. 13) (R.T., p. 967, l. 11) (R.T., p. 970, l. 4) (R.T., p. 970, l. 6) This reference to the National Scholarship Foundation as "NSF", coming on the heels of the Judge's exchanges with Petitioner, the prosecutor's slanderous closing argument, could do nothing but instill in the minds of the jury that the Trial Judge agreed with the prosecutor that the National Scholarship Foundation was what the term "NSF" implies. This characterization by the Trial Judge, coupled with the statements during the Government's closing argument, as hereinafter argued, and with the other exchanges with the Petitioner by the Trial Judge, resulted in incurable prejudice to the Petitioner.

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V

INCURABLE PREJUDICE AND THE DENIAL OF A FAIR TRIAL RESULTED TO THE PETITIONER FROM THE FOLLOWING: THE TRIAL JUDGE'S EXCHANGES WITH THE PETITIONER

The Judge interrupted direct examination to cross-examine the Petitioner on matters that were out of context to the information that was being developed by defense counsel. (R.T., p. 679, l. 9-19) Defense counsel was asking the witness about conversations with Kopelman and Thomas and then the following exchange occurred:

"The Court: Do I understand your interest in this project was purely altruistic?

The Witness: Not necessarily, sir.

The Court: You are aware that non-profit corporations, though they make no taxable profit, pay salaries?

The Witness: That is correct.

The Court: And you expected, did you, to draw funds by way of salary, for

example, is that correct?

The Witness: I expected to draw a salary if I participated in the work of the Foundation."

The Trial Judge's reference to "purely altruistic" motives and his implication that the only reason that the Petitioner had started the foundation program was to earn a salary, was the type of testimony you expect the prosecutor to illicit. It could only convey to the jury that the judge believed that the Petitioner's motives were not purely altruistic and that his point in setting up the foundation was just to earn a lot of money for himself, which was exactly the Government's position.

Later, defense coun el was (R.T., p. 697) attempting to develop the mechanics of getting the replies from the schools and raising the money for the scholarships. The Trial Judge interrupted. When defense counsel told the Trial Judge

that he was just about to develop that phase of the testimony he was summarily cut off by the Trial Judge. (R.T., p. 697-698) This was not a matter of the Trial Judge attempting to clarify the record. This was the most effective cross-examination in the case. The prosecutor was not capable of causing the devastating effect that this exchange had on the Petitioner's case. Unfortunately, we do not have motion pictures, so the appeal court cannot see the Court's demeanor during this questioning. However, we respectfully submit that just reading the cold record shows that it conveyed to the jury that the Judge had nothing but contempt for the Petitioner's case and for his ability to raise the money; it interrupted the trend of defense counsel's direct examination; the Court could have waited and clarified this after the direct examination was completed; it intimidated the witness and destroyed the effectiveness of defense

counsel's presentation of the case to the jury in a logical sequence.

The following appears in the Reporter's Transcript pages 697 to 698:

"The Court: Yes. And you say that you would have had to have the names of the students selected by Christmas time?

The Witness: By January.

The Court: By January, is that it?

The Witness: Yes.

The Court: And you needed this deadline so you know how many scholarships you are going to have to award, is that it?

The Witness: That's right, sir.

The Court: Suppose that you had gotten a lot of schools in by Christmas and had gotten all of those names and awarded, let us say hypothetically, 200 scholarships that Christmas. Where would the money have come from?

The Witness: No. 1, the schools--

Mr. Ostrove: I was just coming to that, your Honor.

The Court: Please. I don't need comment.

Go ahead and answer it.

The Witness: The schools, No. 1, would send in the list of students or student, or their selections by January to the Foundation. We would know how many schools we had registered in November, so we would know that we had 50 schools registered. Fine. Then we would go out to industry, private individuals, other foundations, and request moneys from them.

The Court: Do I understand that if you had made your decision by Christmas-time or January to award 300 scholarships, you would have had no funds on hand for those; but would have then gone out and raised the money. Is that it?

The Witness: Negative. We would have had the funds on hand.

The Court: How?

The Witness: By knowing how many

schools we had registered, we could take a percentage then and ask for so much donations from different corporations and companies.

The Court: Suppose you weren't successful with those corporations?

The Witness: Then I would have had to make some donation myself.

The Court: And you would have made up the money personally, is that what you are telling me?

The Witness: Apparently it would have had to have been that.

The Court: All right. Go ahead."

Defense counsel then attempted to continue his direct examination, in a logical sequence, and again the Court interrupted (R.T., p. 699, l. 16-21) as follows:

"The Court: As of October when all of these mailings went out, you hadn't raised any money, is that correct?

The Witness: That is correct. I did

not want to raise any at that time.

The Court: Go ahead."

Again defense counsel attempted to resume his direct examination, in a logical sequence, and again the Trial Judge interrupted, as follows: (R.T., p. 700, l. 1-5)

"The Court: As of that day had you raised any money for scholarships?

The Witness: All I had was pledges at that time.

The Court: All right. Go ahead."

Again defense counsel attempted to proceed with the development of his direct testimony and again the Court interrupted as follows: (R.T., p. 706)

"The Court: Now, let me understand this. This whole set of figures that is being discussed now is based on this 1 to 2 percent return, isn't it?

The Witness: That's right.

The Court: A maximum or a likely based on 2 percent of about 600 returns,

isn't that right?

The Witness: That's correct.

The Court: And based on these scholarship figures you would have needed about and would have awarded about $9,000 worth of scholarships, isn't that right?

The Witness: I figured $10,000; but $9,000 is a good figure.

Mr. Ostrove: Your Honor, --

The Court: Just a second, if you don't mind.

But the schools, 600 of them at $25, would have paid in $15,000, wouldn't they?

The Witness: Somewhere in this neighborhood.

The Court: For $9,000 worth of scholarships awarded.

All right. Proceed. I just want to be sure I have my figures straight."

Next, defense counsel was attempting to develop on direct examination, the defendant's educational background. The Trial Judge interrupted with the following

exchange with the defendant (R.T., p. 710-711).

"The Court: How long were you enrolled at that institution?

The Witness: It took approximately two years to complete the necessary work to do that.

The Court: Were you in residence there for that period of time?

The Witness: In '48 I was in residence for one course only.

The Court: And that was for how long a period?

The Witness: For approximately six weeks.

The Court: That was your sole residence at that institution --

The Witness: That was my sole residence at that institution.

The Court: -- which awarded a Ph.D. degree in two subjects?

The Witness: No, sir. We are getting the two conflicted. I then enrolled in

1966, I believe it was, and continued by correspondence with the institution, doing the study --

The Court: So after that one six-week period you were not in residence, but worked with them on correspondence, is that it?

The Witness: That is correct.

The Court: And on the basis of that correspondence were awarded two Ph.D. degrees?

The Witness: Not two Ph.D.s, no, sir.

The Court: Go ahead.

The Witness: They sent me the texts. I did the homework, my dissertation in philosophy, completed that one first. It should have been in botonical medicine first, but I didn't complete that until after I had completed my philosophy.

The Court: All right. Ladies and gentlemen of the jury, we are going to take the evening adjournment at this time. We are going to have to start a little earlier and possibly work later tomorrow."

The exchanges referred to occurred near the end of the Court day on April 10, 1969. On Friday morning, April 11, 1969, defense counsel complained to the Judge about these exchanges (R.T., p. 717, l. 7, p. 719, l. 2). The Court states (R.T., p. 717, l. 16 and 17) "Objections to particular questions must be made before they are answered." However, this Court will note, we hope, that when defense counsel attempted to interrupt the Judge and object to his line of questioning, defense counsel was summarily cut off from objecting. For example, see (R.T., p. 706, l. 14) where defense counsel was not permitted to get the words "I object" out. See (R.T., p. 697, l. 19) where, again, defense counsel was attempting to address the Court to object to the line of questioning and was summarily cut off.

Couple the foregoing exchanges with the references referred to in argument under paragraph IV above by the Judge,

and you have a clear case of the Judge virtually telling the jury: "I don't believe this man; I have nothing but contempt for his alleged educational background; I think this whole program is a sham and a fraud." This could not have been conveyed to the jury any more effectively if the Judge had actually said these words. By the time the Trial Judge was finished with these exchanges with the Petitioner and his references as argued under paragraph IV above, the Petitioner had no chance whatsoever for an acquittal.

While it is true that the Trial Judge has wide latitude in questioning witnesses and commenting on the evidence, Smith vs. U.S., 305 F 2d 197, makes it very clear that any such comment must be "fair comment", not calculated to lead the jury to believe that the Judge is favoring either the prosecution or the defense.

Likewise, in the case of U.S. vs. Lewis, 338 F 2d 137, it was held "for Trial Judge to ask more than eleven hundred questions of various witnesses was not desirable but was not prejudicial error where Judge asked only one question of defendant."

Here, the Judge asked many questions of Petitioner, as previously pointed out, and not calculated to clarify the record, but in the nature of cross-examination. It is interesting to note that after defense counsel complained to the Trial Judge the following morning, after the exchanges referred to above, the Trial Judge did not thereafter further question the Petitioner. Petitioner submits that the damage that had been done was obvious to the Trial Judge.

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VI

INCURABLE PREJUDICE AND THE DENIAL OF A FAIR TRIAL RESULTED TO THE PETITIONER FROM THE FOLLOWING: THE TRIAL JUDGE FAILED TO PERMIT COUNSEL FOR PETITIONER TO COMPLETE HIS CLOSING ARGUMENT

It is obvious from a reading of the transcript that defense counsel did not intend to bind himself right to the second to a fifty minute argument. He was forced to leave many important matters uncovered by argument, and if he had been permitted to complete his argument, which would have taken but a few moments more, there would have been no prejudice to the Government, since it would have had the last word and could have been granted the extra time necessary to comment on any point raised by the defense. Petitioner does not argue that it is not within the discretion of the Trial Court to limit the time of argument in a criminal case. Petitioner argues that attempting to limit the defense counsel right to the second,

when important matters remain to be covered, is an abuse of that discretion.

Here we had a six day, very involved trial. The Court had asked the attorneys for both sides how much time they thought their closing arguments would take and a time of approximately fifty minutes each was agreed upon. Certainly, defense counsel took this to be an approximate time; not that he would be limited right to the minute. When the Trial Judge advised the defense counsel that his time had expired, defense counsel attempted to complete his argument but was unable to. (R.T., p. 939-940) At R.T., 940, l. 15-20 we find the following:

"I am on the spot, your Honor, because I have at least another five or ten minutes.

The Court: I am sorry, but both sides in advance set a time limit by agreement and asked the Court to enforce it;

and I must do so.

I will give you one more to finish."

Thus, defense counsel was made to leave his argument incomplete. If he had been permitted to complete his argument, this would have resulted in no prejudice to the Government, since the Government being entitled to close, could have been granted the courtesy of extra time to reply. If Petitioner's closing argument had gone on for several hours and was merely repetitious, or something of that nature, the abrupt termination of his argument by the Trial Court would be understandable. In this case, however, defense counsel had not completed his prepared closing argument, leaving many important matters unargued on behalf of the Petitioner.

VII

THE GOVERNMENT'S CLOSING ARGUMENT CONSTITUTED PLAIN ERROR AND DENIED THE PETITIONER A FAIR TRIAL

The Government's attorney referred

to Petitioner's office as "the home of con men". (R.T., p. 902, l. 2,3).

Government's counsel made reference to the fact that a witness, Miss Bruce, "was under subpoena as a Government witness and wasn't called." (R.T., p. 904, l. 1-3)

Government's counsel referred to "this phony defendant with the phony exhibits". (R.T., p. 904, l. 23) In referring to the Petitioner's job at Hughes Aircraft, which the Government failed to prove, (see the testimony of Shirley Snyder, R.T., p. 839-849) he states to the jury (R.T., p. 905, l. 13, 14) "When you read the job description it sounds more like he took care of trash and not anything else there." The witness had testified that she did not know the Petitioner; that she did not know what he did at Hughes Aircraft; that the general job title does not control an individual's actual activities. Also, the Hughes directory

and other interdepartmental correspondence in evidence supported the Petitioner's position. (Petitioner's Exhibits T and U)

At (R.T., p. 905, l. 15, 16) Government's counsel said "We have the phony donation, the phony November 14th documents, the phony IRS documents".

Again at (R.T., p. 943) the prosecutor refers to hypothetical evidence which he has neither proved nor disproved and says: (R.T., p. 943, l. 4 6) "So that this is as phony as everything else."

At (R.T., p. 947) the prosecutor states: "I don't think we can trust Mr. Kopelman too far, either, by the way he is out at 8400 Sunset with the rest of them. I am not vouching for him." With the rest of who? There was no one else on trial here but the Petitioner and this type of remark implied to the jury that everyone who had anything to do with 8400 Sunset Boulevard was a con man as referred to above. This included just about every

Government witness. Practically every witness for the Government had some connection with offices at 8400 Sunset Boulevard. At (R.T., p. 947, l. 24) the prosecutor says "The $340 from the Petitioner's girl friend was to put towards the postage so that there would be enough money in the NSF bank account to cover the postage for the big mailing." There is nothing in the records to show that this account was ever without sufficient funds. If the reference to "NSF" is to the National Scholarship Foundation, then this supports our previous argument that the term "NSF" would have a meaning detrimental to the Petitioner in the minds of the jurors.

Then the prosecutor uses the expression "con game" two more times at (R.T., p. 948, l. 16, 18).

With regard to the Petitioner's educational background, the prosecutor said, without ever offering any proof on

the subject, that his degrees were obviously shown to be from "a diploma mill" (R.T., p. 954, l. 13-16) "The defendant needs those in his con game. They make it look better." (R.T., p. 955, l. 1,2)

Now, this next maneuver I am about to comment on, is the most preposterous I have seen pulled by a prosecutor in my experience. On cross-examination, the prosecutor had the following exchange with the Petitioner (R.T., p. 745, l. 9-19). "By Mr. Wallin:

Q Are you a member of the American Academy of Botony?

A No. I have made application, though.

Q Have you heard anything on your application?

A Negative. No.

Q Would you believe me if I told you I made that up?

A You made it up? Fine. There is

such a society in the United States though with a similar name. I don't know whether it's the exact name of that or not. I would have to look on the application."

This is the only reference in the transcript to this. It was not shown by the record whether such a society or a society with a similar name exists. Then, in closing argument the prosecutor says the following: (R.T., p. 955, l. 14-19) "He has lied so much -- in fact, he is so eager to lie, he said he belongs to the American Society of Botony, or whatever that was that I made up the other day." "That just shows -- that's a trick, ladies and gentlemen. No question about it. Just a trick that proves nothing about the scheme --." (Defense counsel made objection) Then at line 23, on the same page, the prosecutor says, "It just shows the defendant's eagerness to lie about anything."

This not only was a trick. It was a low trick. It was improper closing argument, in that the prosecutor cannot testify. The comment that he made on cross-examination, "Would you believe me if I told you I made that up.", does not prove or disprove anything and there was nothing placed into evidence by him to show that there was or was not an "American Society of Botony" or any similar organization. Then, in closing argument, he comments on this manufactured evidence. This is so obviously improper, that it hardly seems necessary to cite authority. Then he continues, unrelented, with his slanderous attack. (R.T., p. 956, l. 13) "phony documents, phony donations", (l. 16) "Well, this has been a con game from the word go.", and he uses the word "con" three more times on that page, l. 17, 18 and 23.

Thus, the prosecution succeeded in slandering this Petitioner into a conviction.

Exceptions to rulings or orders of the court are unnecessary and for all purposes for which an exception has heretofore been necessary it is sufficient that a party, at the time the ruling or order of the court is made or sought, makes known to the court the action which he desires the court to take or his objection to the action of the court and the grounds therefor; but if a party has no opportunity to object to a ruling or order, the absence of an objection does not thereafter prejudice him.

Federal Rules of Criminal Procedure, Rule 51

Even an unexcused failure to object will not prejudice raising a point on appeal if it constitutes "plain error" under Rule 52(b).

Moore's Federal Practice, Vol. 8A, Section 51.02 (51-4)

Rule 52. Harmless Error and Plain Error.

(a) Harmless Error. Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded.

(b) Plain Error. Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

Federal Rules of Criminal Procedure, Rule 52

On a nerve-center issue we are more likely to hold the prosecutor to account. Cross v. United States, 122 U.S. App. D.C. 283, 353 F.2d 454 (1965). The prejudice digs in and holds on. As Judge Boreman pointed out in Wallace v. United States, 281 F. 2d 656, 667-668 (4th Cir. 1960).

.....

Stewart v. United States, 1957, 101 U.S. App.D.C. 51, 247 F.2d 42, 47. These repeated and seemingly deliberate misquotes, *** may well have become so firmly implanted on the jurors' minds as to cloud the actual testimony. It would be difficult to conclude that the jury was not substantially, perhaps decisively, influenced by the prosecutor's persistent but unwarranted assertions, and by his misstatements.

Stewart v. United States, supra

United States v. Atkinson (1936) 297 US157, 160, 56 S Ct 391, 80 L Ed 555: "In exceptional circumstances, especially in criminal cases, appellate courts, in the public interest, may, of their own motion, notice errors to which no exception has been taken, if the errors are obvious, or if they otherwise seriously affect the fairness, integrity

or public reputation of judicial proceedings".

United States vs. Atkinson, supra

The standard normally to be applied on review in federal cases was formulated in the leading case of Kotteakos v. United States, 328 U.S. 750.

If one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand.

Kotteakos vs. United States,

328 U.S. 750, 764, 765

To the same effect: Fiswick v. United States (1946) 329 US 211, 218, 67 S Ct 224, 91 L Ed 196; Krulewitch v. United States (1949) 336 US 440, 69 S Ct 170, 93 L Ed 790; Bihn v. United States (1946) 328 US 633, 638 639, 66 S Ct 1172, 90 L Ed 1485: Since the scales were quite evenly balanced, we feel that the jury might have been influenced by the erroneous charge.... Nor is it enough to say that guilt may be deduced from the whole record.

But if the ultimate decision is to turn on a balancing of probabilities and the balance is not clearly on the side of harmlessness, defendant should get the benefit of the doubt.

Moore's Federal Practice

Vol. 8A, Sect. 52.03, Page 52-9

.....

.....

VIII

THE CHART USED BY THE GOVERNMENT IN CLOSING ARGUMENT OVER OBJECTIONS OF DEFENSE COUNSEL, CONSTITUTED PLAIN ERROR

At the beginning of the trial defense counsel objected to the use of the chart in question, because it misstated the premise of the brochure in question, which resulted in the indictment, to which the Government chart allegedly referred. The Trial Judge said at the outset of the trial (R.T. 17) "If the proof comes in which justifies the factual basis upon which this mathematics is done, you can use it in argument." No proof came in that the Petitioner expected anything closely resembling the numbers referred to in the chart in question. No witness in the trial testified that the Petitioner said that he expected any particular percentage of response from the high schools. The only real evidence was

that supplied by postal inspector Jones; that out of this entire mailing, in excess of 28,000, that there was a response of 225 schools, which sent in checks of $25.00 each; or less than a 1% return. The figures which the defense counsel had prepared, which he was never permitted to present to the jury, because he was summarily cut off by the Trial Judge, would have dealt with the actual numbers involved, rather than the hypothetical numbers presented to the jury by the Government, unsupported by any proof at the trial. The Petitioner testified that he expected a return of approximately one to two percent and that based on that figure he would have had to raise approximately $9,000.00 in scholarships (R.T. 706).

The prosecutor stated at the outset of the case (R.T. 17) "May I state that we intend to prove by the word 'applicants' the defendant means students and not

schools." But the prosecutor failed to prove this. The idea of a student application fee was strictly that of Thomas and Kopelman and was rejected by Petitioner. A reading of the brochure which lead to the indictment shows that Petitioner did not intend to charge any student application fee whatsoever. The cost of processing the student applications would have come out of the $75.00 fee paid by the school.

That is the reason that the use of the chart in question was improper. The Government did not submit proof to justify the factual basis upon which the mathematics in the chart was done, nor did the Government prove that the word "applicants" means students and not schools. Nevertheless, over strenuous objection by both defense counsel, the Government was permitted to use this chart, which was used for only one purpose, not to prove

or disprove anything, but to be extremely prejudicial to the Petitioner.

IX

THE ADMISSION INTO EVIDENCE OF MRS. CREIGHTON'S TESTIMONY RESULTED IN INCURABLE PREJUDICE TO THE PETITIONER AND DENIED HIM A FAIR TRIAL.

This was another one of the "technical" errors in connection with matters of evidence referred to by the Court of Appeals in its opinion. Plaintiff had not taken the witness stand. No foundation had therefore had been laid for impeaching a statement or a denial of a statement made by the Petitioner. The statement in question attributed to the Petitioner had nothing to do with any of the acts charged in the indictment. The offered statement was not made in connection with inducing anyone to give monies to the National Scholarship Foundation, or to become an officer, director or trustee of the National Scholarship Foundation, or for

any relevant purpose whatsoever in connection with this indictment. Mrs. Creighton was permitted to testify, over objections, that at a party at her home, the date of which was not identified, that the Petitioner stated that "He said he had himself been a practicing physician for twenty years." (R.T. III-113)

Petitioner had not taken the witness stand and had not testified concerning any such alleged statements, nor had he denied making any such alleged statement. Thus the Government was successful in discrediting the Petitioner on a collateral matter, during the Government's case, before Petitioner had taken the witness stand and this constituted prejudicial error and the denial of a fair trial.

In the Government's brief before the Court of Appeals it offers no authority for the admissibility of such a statement. The Government makes the following

argument:

"Defendant contends that the admission into evidence of Mrs. Creighton's testimony that she had heard the defendant pass himself off as a practicing physician constituted error. Defendant's contention is without merit. This was a fraud prosecution in which the critical fact was the defendant's honest good faith. Evidence as to his lack of truthfulness was certainly relevant and material in such a case."

At the hearing before the Court of Appeals, Justice Ely referred to the illiciting of such testimony by the Government as a "low blow" by the Government. Justice Barnes asked counsel for the Government if he had any authority to justify such testimony. Government counsel answered in the negative.

We submit that if, in a fraud case, the Government can question witnesses as to every time Government counsel believes

the defendant lied, it is then possible to impeach the defendant whether or not the defendant takes the witness stand. We submit that in a fraud case this was considerably more than "some technical error". It was plain error. It resulted in incurable prejudice and denied the defendant a fair trial.

X

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING PETITIONER'S APPLICATION FOR PROBATION AND THE COURT OF APPEALS ERRED IN STATING THAT IT WAS POWERLESS TO DEAL WITH THE MATTER OF PROBATION.

At the hearing before the Court of Appeals Justice Ely conceded that the probation report in question was "very unfair", stating: "But what can we do about it?"

Petitioner does not argue that probation can be demanded as a matter of right. Petitioner's argument is simply that he was at least entitled to have a fair probation report presented to the

Trial Judge, not one which accentuated the negative aspects of his personal life and stated the opinion of some third obscure party not connected with the case in question.

The probation report consisted of an interview by the probation officer with Petitioner's estranged wife, an ex-wife, and an interview with a Dr. Comora, who had apparently had some unsatisfactory business dealings with Petitioner. Harry Geyer, vice-president of a bank and a government's witness testified that he had known Petitioner for twenty-five to thirty years and had agreed to be a trustee of the National Scholarship Foundation. He was not interviewed by the probation officer. General Carlson, another government witness, testified that he had known the Petitioner for many years and had no reason not to trust him. He was not interviewed by the probation officer.

We submit that a probation report based on statements of two ex-wives and a disgruntled ex-business associate is so grossly unfair as to shock the conscience of the Court. The probation report indicates that the Petitioner had no prior record of any kind whatsoever. The probation officer says in this report that in his opinion the Petitioner went into this particular project in order to be an executive controlling large sums of money. Apparently the probation officer did not believe that the Petitioner went into this mailing for the purpose of stealing monies from the schools.

Petitioner worked at Hughes Aircraft from 1951 to 1960. Then he worked at Autonetics, Division of North American Aviation until 1967. Petitioner had two honorable discharges from the U. S. Navy. Complete restitution had been made, in that the postal inspectors had intercepted and returned the mail.

To use Las Vegas jargon, this Petitioner was convicted on the "come". He lined up a Board of Trustees as of October 30, 1968. The mailing in question went out November 13, 1968. The Petitioner was arrested December 2, 1968, without ever having received any funds from the high schools, except six checks which were still in the National Scholarship Foundation bank account at the time of the trial. He had made arrangements to line up funds through Hull and Revorkian. He entered into a written contract with a fund raiser, Shafer. Under these circumstances, where none of us will ever know whether he intended to commit fraud, isn't he entitled to probation, particularly a man of his age, with no prior record?

For the foregoing reasons, we respectfully submit that it was an abuse of discretion for the Trial Judge to fail

to grant probation to this Petitioner.

CONCLUSION

The opinion of the Court of Appeals refers to the fact that the Court of Appeals has carefully considered the 42 Government Exhibits. The first 30 Exhibits, through 30-a, consisted of 30 identical mailings to 30 high schools throughout the United States. The Petitioner stipulated to the introduction of those in evidence. Exhibit 31 was merely the post office department form indicating the mailing of the 28,957 letters, the introduction of which was also stipulated to. Exhibit 32 was an empty manila folder. Exhibits 32-a through 32-e inclusive, consist of items admittedly prepared by Thomas. Exhibits 33, 33-a and 33-b, are merely the printer's file on National Scholarship Foundation, indicating the printing (and Ryan testified that this printing was entirely directed

by Thomas). Exhibits 14-a and 14-b consist of an envelope and Articles of Incorporation and other items sent by Petitioner to General Carlson. Exhibits 15, 15-a and 15-b are the bank records of National Scholarship Foundation, a copy of the National Scholarship Foundation's brochure, again repeated, and copies of checks deposited to the account of National Scholarship Foundation. Exhibit 36 is a copy of the letter agreement with Harold Shafer, wherein Shafer agreed to be the Fund Raising Chairman for the National Scholarship Foundation. Exhibit 37 is a stipulation. Exhibit 38 is a stipulation. Exhibit 39 is a waiver of the constitutional right signed by Petitioner. Exhibit 40 is the disputed Government chart. Exhibit 41 is a copy of the Hughes Aircraft "Position Description", which has to do with the position of Petitioner when he worked for Hughes Aircraft. Exhibit 42

is a copy of the Internal Revenue Service file.

In examining the foregoing Exhibits, the only items that are really relevant on the issue of fraud are those prepared by Thomas, which clearly show that Thomas was thinking and intended a very large return of money and was attempting to carve out a very large, extraordinary large, income arrangement for himself, which was rejected by the Petitioner.

The first nine defense Exhibits illustrate the steps taken by the Petitioner to organize and incorporate the National Scholarship Foundation.

Exhibit 4-a of the Government, is particularly revealing, on the issue of Petitioner's intent to commit fraud. It is a postal card, advising St. Henry's High School, that their $25.00 was received and that they will in the future receive additional materials concerning the

foundation. (However, the Petitioner was arrested within two weeks after the mailing, so naturally no materials were ever forthcoming. However, if the Petitioner intended to take the money and run, as the Government contends, why in the world would he go to the trouble of sending a post card to acknowledge receipt of a check?)

There may have been sufficient evidence, as the opinion of the Court of Appeals states, to require that the case go to the jury after the close of all of the evidence. There was not, however, sufficient evidence of fraud to require that the case go to the jury at the close of the Government's case.

The opinion of the Court of Appeals is silent as to the points raised in the appeal relating to the conduct, language and participation by the Trial Judge in the trial; the alleged improper

argument of Government counsel, and the Trial Court's denial of probation, all of which, we respectfully submit were critical in this type of case, where the jury must judge based on what it believes a defendant was thinking when he sent out a mailing, and not on what the defendant did, since in this case it is conceded that all mail was intercepted by the postal authorities and the Petitioner received no funds, except six checks in the amount of $25.00 each, all of which remain in the bank account of National Scholarship Foundation to this date.

The opinion of the Court of Appeals states that "While there was some technical error in connection with two matters of evidence, (without specifying what matters of evidence) we have concluded, in overall consideration, that the error was not prejudicial as to require reversal."

This conclusion of the Court of Appeals might well be true in the case

involving overt violent acts, or overt acts of any type, on the part of a particular defendant. But here, where it was so vitally important for the jury to judge not what the Petitioner did, but what he was "thinking" at the time that he did it, the matter of evidence with regard to statements made by the Petitioner, which were irrelevant, and the exclusion of the statements made by his co-conspirator, Thomas, for which a foundation had properly been laid, became critical in causing the jury to convict this particular Petitioner and therefore those items should not have been merely treated as "some technical error" by the Court of Appeals, we respectfully submit.

Insofar as the treatment by the Court of Appeals of denial of probation is concerned, we again respectfully submit that we concede that probation is a matter within the discretion of the trial

court. However, here we had a probation report which is so extraordinarily unfair, that no trial court, either the one in question or any other could make a fair determination of whether or not the Petitioner should have been granted probation. There was, therefore, clear abuse of the trial court's discretion in failing to grant probation based on this blatantly unfair report. Here we had a man with no prior record. He had held responsible positions, none of which was checked out by the probation officer. He had had security clearance by the United States Government, and when this was called to the attention of the probation officer, co-counsel was told that it was "too late", because the probation report had already been written. There had been witnesses at the trial, such as Geyer and Carlson, who had known the Petitioner for many years and said very favorable things about their

past dealings with him. Adding up all of these factors, we respectfully submit that the denial of probation amounted to a clear abuse of discretion and that the Court of Appeals can and should be concerned with said denial, contrary to the statement in its opinion.

We agree that the verdict of the jury is final on disputed factual issues. However, in a fraud case, a jury is bound to be dramatically effected by statements by a witness that the Petitioner said at her home that he had been a medical doctor. If the Government could bring in witnesses to testify as to every time a defendant lied, irrelevant to the issues of a particular indictment, the Government would have little trouble in getting a conviction in every fraud case. And that is exactly what happened here. Equally as devastating, was the exclusion of the testimony of Kevorkian as to the offered

testimony of Thomas, for which a foundation had been laid, coupled with the fact that Thomas was a co-conspirator at the point that the statement in question was made. Thus an item that was very prejudicial and which could only prejudice the Petitioner in the minds of the jury was permitted to come in and statements which could have aided the jury in believing that only Thomas was interested in pushing this mailing out and not the Petitioner, was excluded.

Due process requires fundamental fairness. In Re Murchison, 349 U.S. 133 (1955) and the fair application of the Criminal Rules is the obligation of the District Courts. McNabb vs. United States, 318 U.S. 332 (1943). As this Court held in Estes vs. Texas, 381 U.S. 532 (1965), where the probability of prejudice to the accused is inherent in the circumstances, it is not necessary

to find identifiable prejudice in order to conclude that due processes wanting.

For the foregoing reasons, Petitioner respectfully submits the Petition for Certiorari should be granted.

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellee,	
v.	No. 24,812
LEWIS K. MacFarlane, Appellant.	

(September 16, 1970)

Appeal from the United States District Court for the Central District of California

Before: BARNES, ELY, and HUFSTEDLER, Circuit Judges.

PER CURIAM:

Appellant was convicted by a jury of thirty counts of mail fraud in sending some 28,957 letters to the same number of high schools in this country, suggesting that if each of said schools would pay a $25.00 registration fee to National Scholarship Foundation, a non-profit corporation organized by appellant, the foundation had the goal of awarding to one out of every fifty applicants, a scholarship, ranging in value from $250 to $5,000.

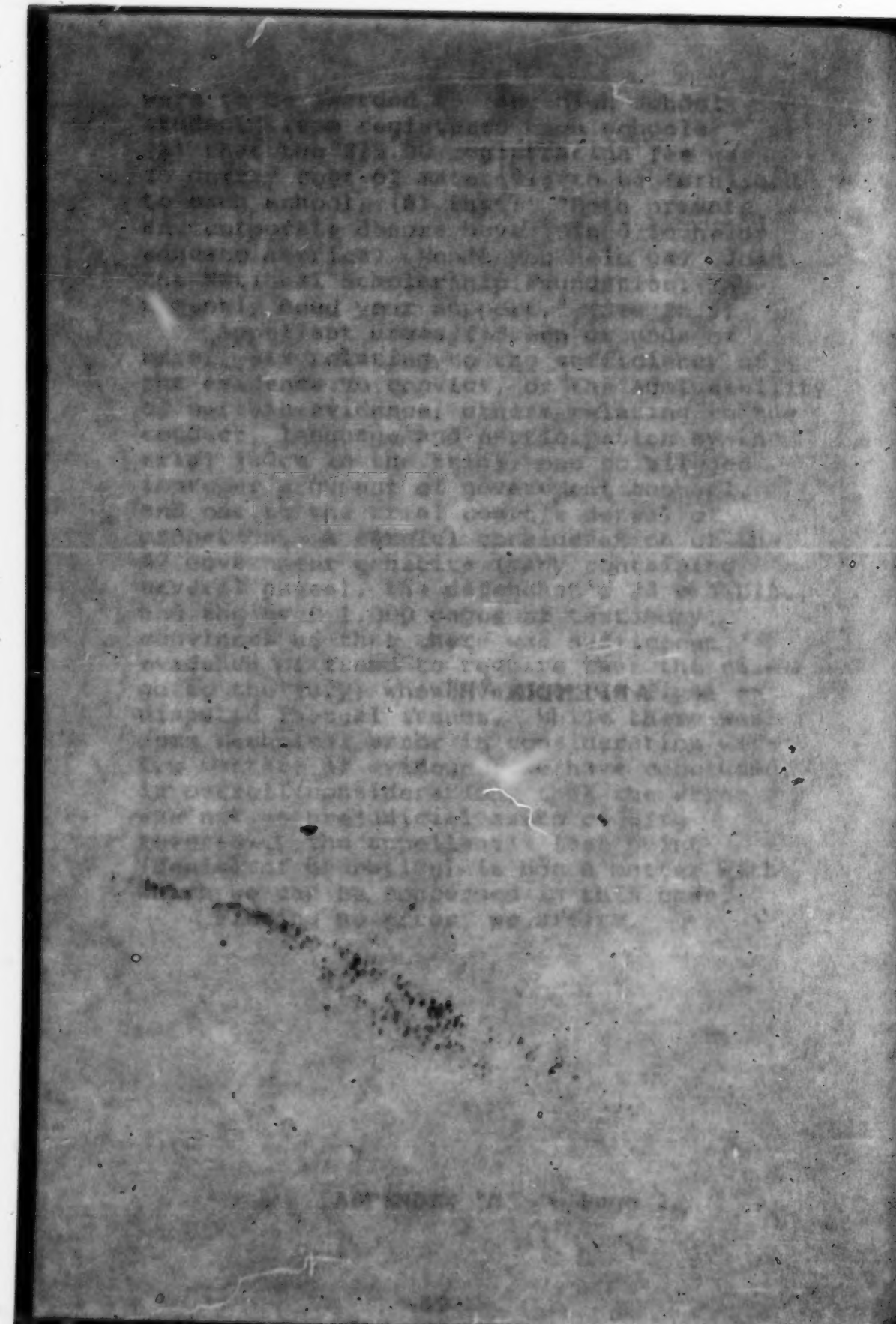
Although the name National Scholastic Foundation had been pre-empted in California, appellant then organized a Nevada corporation bearing the same name but unable to do business in California under that name. It was charged (1) that he represented National Scholarship Foundation to be an established organization; (2) a non-profit concern; (3) with responsible trustees; (4) that scholarships ranging in value from $250 to $5,000

were to be awarded to "any high school student" from registered high schools; (5) that the $25.00 registration fee was to defray cost of materials to be furnished to each school; (6) that: "Both private and corporate donors have joined to help educate America. Won't you help us? Join the National Scholarship Foundation. We urgently need your support." (See Ex.5)

Appellant urges fifteen grounds of error, six relating to the sufficiency of the evidence to convict, or the admissibility of certain evidence; others relating to the conduct, language and participation by the trial judge in the trial; one to alleged improper argument of government counsel, and one to the trial court's denial of probation. A careful consideration of the 42 Government exhibits (many containing several pages), the defendant's 23 exhibits, and the over 1,000 pages of testimony, convinces us that there was sufficient evidence of fraud to require that the case go to the jury; whose verdict is final on disputed factual issues. While there was some technical error in consideration with two matters of evidence, we have concluded, in overall consideration, that the error was not so prejudicial as to require reversal. The appellant's last point (denial of probation) is not a matter with which we can be concerned in this case.

Finding no error, we affirm.

APPENDIX "B"



UNITED STATES COURT OF APPEALS FOR

THE NINTH CIRCUIT

FILED
Oct 12 1970
Wm. B. Luck, Clerk

LUCIUS KNIGHT MacFARLANE, Appellant	)	
vs.	)	No. 24812
UNITED STATES OF AMERICA, Appellee	)	

ORDER ON MOTION

Before: BARNES, ELY and HUFSTEDLER, Circuit Judges

IT IS ORDERED that appellants petition for rehearing be denied.

/s/ Stanley N. Barnes

/s/ Walter Ely

/s/ Shirley M. Hufstedler
U. S. Circuit Judges

APPENDIX "B"

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED
Oct 20 1970
Wm. B. Luck, Clerk

UNITED STATES OF AMERICA,
Plaintiff-Appellee

-vs-

No. 24812

LUCIUS KNIGHT MAC FARLANE,
Defendant-Appellant

ORDER STAYING ISSUANCE OF MANDATE

Upon application of DAVID OSTROVE counsel for the Appellant, and good cause appearing, IT IS ORDERED that the issuance, under Rule 41(a) of the Federal Rules of Appellate Procedure, of the certified copy of the judgment of this Court in the above cause be and hereby is stayed pending the filing, consideration and disposition by the Supreme Court of the United States of a petition for writ of certiorari to be made by the Appellant herein, provided such petition is filed in the Clerk's Office of the Supreme Court of the United States on or before November 12, 1970.

In the event the petition for writ of certiorari is granted, then this stay is to continue pending the final disposition of the case by the Supreme Court of the United States.

/s/ Stanley N. Barnes
United States Circuit Judge

DATED: SAN FRANCISCO, CALIF.

OCTOBER 19, 1970

APPENDIX "D"

SUPREME COURT OF THE UNITED STATES

No. ---------- , October Term, 1970

LUCIUS K. MacFARLANE,

Petitioner,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner (A),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including Dec. 11, 1970, without prejudice to the Court's consideration as to whether this application has been filed in time.

S/ W. O. DOUGLAS
Associate Justice of the Supreme Court of the United States

Dated this 18th day of November, 1970

APPENDIX "D"

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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1086

LUCIUS K. MACFARLANE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The *per curiam* opinion of the court of appeals (Pet. App. A) is reported at 431 F.2d 703.

JURISDICTION

The judgment of the court of appeals was entered on September 16, 1970. A petition for rehearing was denied on October 12, 1970. Mr. Justice Douglas extended the time for filing a petition for a writ of cer-

tiorari to December 11, 1970, without prejudice to the Court's consideration as to whether the application was timely filed. The petition was filed on December 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to sustain the verdict.
2. Whether the district court erred in various rulings.
3. Whether the prosecutor's closing argument was prejudicial.
4. Whether the probation report was unfair.

STATEMENT

After a jury trial in the United States District Court for the Central District of California, petitioner was convicted of thirty counts of mail fraud, in violation of 18 U.S.C. 1341, arising out of a scheme to obtain money from high schools across the country. On May 13, 1969, he was sentenced to concurrent prison terms of two years on each count, with eligibility for parole to be determined under 18 U.S.C. 4208(a)(2).

The evidence showed that in August, 1968, petitioner met John Thomas (T. 133),[1] who said he had conducted a sample mailing for a proposed "National

[1] "T." refers to the seven-volume transcript of proceedings before the district court, which we are lodging with the Clerk of this Court.

Scholarship Foundation" to 300 high schools, and had received a response from thirteen schools (T. 134-137). Petitioner indicated that he had previous experience in foundation and fellowship work and that he would have no difficulty in raising the necessary funds (T. 137-139, 187). Soon thereafter, petitioner took control of the program. He told Thomas that he had begun to draw up corporate papers using the name "National Scholarship Foundation" (hereinafter referred to as the "Foundation") (T. 140-142, 513). In September, Thomas gave petitioner the proceeds of the spring mailing ($325) (T. 144). About that time, petitioner told Thomas that he had a firm $250,000 commitment from the Rockefeller Foundation for the Foundation (T. 151); and that he had been advised by entertainers Bing Crosby and Pat Boone, and by Omar Bradley, Curtis LeMay and Howard Hughes that they would serve as trustees of the Foundation (T. 150-153).

In September, petitioner sought commitments of various individuals to become foundation trustees. He represented that the Foundation had substantial funds available to award scholarships (T. 295), that he had commitments for funds from the Rockefeller and Ford Foundations (T. 309-310, 358, 428), and that matching federal grants would be forthcoming (T. 359). He also suggested the possibility of getting funds from the Howard Hughes Foundation (T. 410, 428-429). One prospective trustee was told that other prominent men, such as former California Governor Goodwin Knight and several judges, were going to be trustees (Tr. 472). Acting on petitioner's representa-

tions, several of the persons approached agreed to serve as trustees (T. 290-291, 394, 470). Others indicated to petitioner that they wished to know more about the Foundation before they would agree to the use of their names as trustees (T. 279-280, 357). The Foundation received no donations other than a check for $340 and two other donations from petitioner's associates which were used to pay mailing costs. (T. 579-580, 583-585, 590, 738, 766).

On November 13, 1968, petitioner caused more than 28,000 brochures to be mailed to high schools across the United States (T. 49-54, 118). In the brochure and attachments representations were made that the Foundation had eleven responsible named trustees, and that private and corporate donors had joined to help educate America. They stated that scholarships ranging in value from $250 to $5,000 would be awarded to one out of every fifty applicants; and that the school must register prior to November 22, 1968, in order to qualify its students. A registration fee of $25.00 was sought to cover administrative expenses (see T. 967-968).[2] Several school officials

[2] Before the brochures were mailed, Thomas told petitioner that he did not wish to be associated with the Foundation any longer and that the petitioner was not authorized to use his name. Thomas resigned or was discharged by petitioner (T. 157-159, 218-219, 729). On November 12, 1968, Thomas contacted a Postal Inspector and gave information about petitioner's activities (T. 565-569). Manuel Kopelman, who had originally signed the California articles of incorporation for the Foundation (T. 441-442), advised petitioner not to make the mailing (T. 431). Trustee Bruce Blaylock also told petitioner not to make the mailing with his and Lindsay Crosby's names listed as trustees of the Foundation (T. 360, 432).

who received the mailing testified that they thought that the Foundation was similar to other National Scholarship programs and that they each sent a $25.00 check to the Foundation in order to allow their students to qualify for the Foundation's scholarships (T. 84-87, 93-96, 98-99). Postal inspectors intercepted 430 other letters, at least 225 of which had $25 checks payable to the National Scholarship Foundation (T. 522-523, 547-548).

ARGUMENT

1. Petitioner argues (Pet. 6-9) that the evidence produced against him was insufficient, since it is allegedly more consistent with a finding of good faith coupled with poor judgment than with a finding of intent to defraud. The jury, however, was carefully instructed by the trial court that petitioner's claim of good faith, if believed, would provide a complete defense to the crime of mail fraud, and that intent to defraud was a prerequisite to a finding of guilt (T. 971-972). The jury's determination of petitioner's fraudulent intent was well grounded in the evidence.

2. Petitioner's objections to various rulings by the trial court are without merit.

a. Petitioner objects (Pet. 9-16) to a ruling excluding the testimony of defense witness Kevorkian about a statement Thomas made several weeks before the meeting at which Thomas told petitioner not to make the mailing (T. 721-723). The statement was offered for the purpose of showing that it was Thomas, not petitioner, who was eager to get the mailing out. The district court properly excluded the proffered

hearsay statement, since, as defense counsel admitted, there had been no foundation laid during Thomas's cross-examination. *United States* v. *Battaglia*, 394 F. 2d 304, 317 (C.A. 7); *United States* v. *Bowe*, 360 F. 2d 1, 14-15 (C.A. 2), certiorari denied, 385 U.S. 961. In any event, the statement would not have been inconsistent with the government's case, for no attempt was made to prove that Thomas was anything less than a full participant in the scheme up to the time of his disagreement with petitioner. The excluded statement, therefore, even if admitted and true, would not have negated petitioner's eagerness to make the mailing.

b. The evidence included a folder which petitioner admitted to a postal inspector contained his entire file on the Foundation (T. 524-525). A portion of this file, Exhibit 32-D, included figures setting potential school membership at 30,000 schools at $25 per school—a possible return of $750,000 (T. 788)—and a potential student application market of one million students at $4 per student, yielding a possible $4,000,000 (T. 789). Petitioner objects to the admission of this exhibit into evidence on the basis that the evidence of its authorship was conflicting (Pet. 17-19). That objection goes to its weight, not its admissibility. Since the exhibit was found in petitioner's file on the Foundation, it was clearly relevant.

c. The complaints with respect to the conduct of the trial judge are frivolous on their face. Petitioner had testified to his intent to set up a non-profit corporation (T. 679). The trial court then made legitimate and relevant inquiry concerning petitioner's

motives and his knowledge that non-profit corporations pay salaries (T. 679; Pet. 21-22). Other questions were an inquiry into the mechanics of the proposed scholarship program (Tr. 697-700; Pet. 22-27), and into the mathematics involved in the numerical and financial return expected from the mailing (T. 706; Pet. 27-28).

Finally, the judge asked about petitioner's educational background (T. 710-711; Pet. 28-30). Defendant later objected to this questioning (T. 717-719) and asked the judge to give remedial relief. The trial judge indicated to counsel that no cynicism was intended by his questions and that he intended to instruct the jury that his questions were asked for the purpose of eliciting information that he thought was important, not to express his personal opinion, and that the jury might disregard any of his comments. Defense counsel said that that would satisfy his objection in the main (T. 719). The jury was instructed that it was not to assume from the judge's questions that he held any opinion on the matters to which they were related, and that the jury was at liberty to disregard all his comments (T. 963).

d. The claim that the trial court showed prejudice by using the term "NSF" to refer to the Foundation is without merit. Prior to the opening statements, in the course of enumerating the lengthy list of exhibits being admitted into evidence by stipulation of both parties (T. 48-60), the trial judge used the abbreviation "NSF" to characterize the longer term "National Scholarship Foundation." (T. 51-55, 59-60, 64-65). The term was used several times in the same manner

by petitioner's counsel himself (T. 67-69). Its subsequent use at two points in the lengthy and detailed instruction of the jury (T. 967, 970) was obviously only a shorthand reference.

e. Government witness Creighton testified that at a party in late October at her home, petitioner said that he had been a practicing physician for twenty years (T. 313) (see Pet. 51-54). An objection that the testimony was irrelevant was overruled, and counsel then indicated that he felt that the testimony was outside the scope of the indictment, since "[t]here is no operative document that refers to Mr. MacFarlane as an M.D. or doctor" (T. 313). There was already evidence, however, that petitioner used the title "Ph.D." (T. 201) and signed Foundation documents as "Dr. L. MacFarlane" (T. 265). In any event, in the context of the long trial and the government's proof, any error in admitting the testimony was harmless, as the court indicated.

f. Petitioner argues that the trial court abused its discretion by strictly holding defense counsel to the previously agreed limit of fifty minutes for closing argument to the jury (Pet. 34-36). This limit was agreed to by counsel as a "maximum outside limit" (T. 853). When petitioner's counsel's time expired, he was given an additional minute to finish (T. 940). The limitation was reasonable. See *Butler* v. *United States*, 317 F. 2d 249 (C.A. 8), certiorari denied *sub nom. Benedec* v. *United States*, 375 U.S. 836, and 375 U.S. 838.

3. The argument of counsel, from which petitioner has culled excerpts (Pet. 36-43), was occasionally in-

tense, but it was based on the evidence and cannot be said to have deprived the petitioner of a fair trial. See *Kowalchuk* v. *United States*, 176 F. 2d 873 (C.A. 6); *United States* v. *Hoffman*, 415 F. 2d 14 (C.A. 7), certiorari denied, 396 U.S. 958; *Isaacs* v. *United States*, 301 F. 2d 706 (C.A. 8), certiorari denied, 371 U.S. 818.

The government was justified in using the chart of which petitioner complains. The chart was a compilation of figures showing the maximum return possible from the scholarship scheme, based on the maximum number of possible schools joining the Foundation and visualizing the return on several combinations of different scholarship values (T. 882-887). The district court correctly observed that the chart was merely a mathematical representation of the government's arguments, to which the evidence was susceptible. Although the chart in part indicated the government's most extreme theory, 100 per cent participation by the schools solicited, the defense was free to point this out and argue whatever error it felt existed (T. 884-885).

4. Petitioner contends that the probation report submitted to the district court was prejudicial and that the refusal of that court to suspend sentence was an abuse of its discretion (Pet. 54). Most of the omitted information to which petitioner refers came out during the trial or at sentencing, and was thus before the district court. It is clear from the judge's comments at sentencing that other considerations than the statements contained in the probation report were paramount in his decision to deny probation. He

stated that petitioner's continued lack of candor with the court, together with the nature of the scheme perpetrated—which had a potential for defrauding high schools and their students throughout the country of large sums of money—required punishment (T. 1013-1014).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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